RECORD AND BRIEFS

No. 16-1275

Supreme Court, U.S.
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In The

# Supreme Court of the United States

VIRGINIA URANIUM, INC., *et al.*,

*Petitioners,*

v.

JOHN WARREN, *et al.*,

*Respondents.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

## REPLY BRIEF FOR PETITIONERS

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## CORPORATE DISCLOSURE STATEMENT

The disclosure statement in the petition for writ of certiorari remains accurate.

## TABLE OF CONTENTS

Page

CORPORATE DISCLOSURE STATEMENT ..... i

TABLE OF AUTHORITIES ..... iii

ARGUMENT ..... 1

CONCLUSION ..... 12

# TABLE OF AUTHORITIES

Page

CASES

*English v. General Elec. Co.*,
496 U.S. 72 (1990) ..... 2, 4, 8, 9

*Entergy Nuclear Vermont Yankee, LLC v. Shumlin*,
733 F.3d 393 (2d Cir. 2013) ..... 2, 3, 7

*Haywood v. Drown*,
556 U.S. 729 (2009) ..... 5

*Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*,
461 U.S. 190 (1983) ..... 2, 4, 5, 10

*Silkwood v. Kerr-McGee Corp.*,
464 U.S. 238 (1984) ..... 4, 9

*Skull Valley Band of Goshute Indians v. Nielson*,
376 F.3d 1223 (10th Cir. 2004) ..... *passim*

*Virginia Uranium, Inc. v. Warren*,
848 F.3d 590 (4th Cir. 2017) ..... *passim*

STATUTORY AND REGULATORY PROVISIONS

42 U.S.C.

§ 2021(k) ..... 4

§ 2296b-3(a) ..... 11

§ 2297h-10(d)(2)(B) ..... 11

82 Fed. Reg. 21,594 (2017) ..... 12

## ARGUMENT

Respondents rest their opposition on a single supposedly "dispositive" proposition: because the Nuclear Regulatory Commission ("NRC") does not regulate uranium mining, they say, "nothing in the [Atomic Energy] Act [("AEA" or "Act")] prevents States from regulating or banning such mining, *regardless* of the State's alleged purpose." Opp.1. Respondents concede that the purpose of the Commonwealth's ban on mining uranium ore was not to ban the *mining* itself, but to ban the next steps in the uranium production process: milling the ore and storing the resulting radioactive tailings. The Commonwealth sought to ensure "the radiological safety of uranium ore milling and tailings storage" by preventing those activities from ever occurring in the first place. Pet.App.40a-41a (Traxler, J., dissenting). The Commonwealth also admits that it was prohibited, under Section 2021(k) of the Act, from enacting a law explicitly banning uranium milling and tailings storage for radiological safety purposes because these "activities" are regulated exclusively by the NRC, and "[S]tates may therefore not regulate them except for purposes other than protection against radiation hazards." Opp.26 (brackets in original). These concessions have boxed Respondents into the untenable position of having to argue that the Commonwealth is free to ban uranium milling and tailings storage for radiological safety purposes by simply banning the antecedent mining of uranium ore.

Respondents prevailed in the court of appeals, but on a theory that they did not advance below and that they decline to defend in this Court. The panel majority held that "a pretext analysis to ascertain [the] legislature's true motive" was inappropriate

here, because the case did not involve invidious discrimination "under the Equal Protection Clause." Pet.App.15a. A "pretext analysis," of course, requires little analysis when the pretext is *admitted*. In any event, neither the Fourth Circuit's theory nor Respondents' theory for ignoring the true purpose of the ban can be squared with this Court's repeated holdings that the federal government has "occupied the entire field of nuclear safety concerns," *Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 212 (1983) ("*PG&E*"), and the bounds of the "preempted field" are defined, "in part, by reference to the motivation behind [a challenged] state law," *English v. General Elec. Co.*, 496 U.S. 72, 84 (1990) (citing *PG&E*, 461 U.S. at 213).

The Fourth Circuit's conclusion also conflicts squarely with the holdings of the Tenth and Second Circuits that this Court's cases require an inquiry into "the purpose and effect of the state law at issue, and, as a result, a state cannot use its authority [over otherwise state and local] matters as a means of regulating radiological hazards." *Skull Valley Band of Goshute Indians v. Nielson*, 376 F.3d 1223, 1248 (10th Cir. 2004); *see also Entergy Nuclear Vermont Yankee, LLC v. Shumlin*, 733 F.3d 393, 416 (2d Cir. 2013). Simply stated, under the view adopted by the Tenth and Second Circuits, the Commonwealth may not use its authority to regulate uranium mining as a pretext for prohibiting uranium milling and tailings management activities based on concerns about radiological safety. "[A]ny state statute grounded in protecting citizens from the radiological dangers of activities regulated by the Act is preempted, regardless of the statute's effect," Pet.App.40a n.12 (Traxler, J., dissenting), and regardless of whether the

statute purports to regulate an activity that is otherwise subject to plenary state power.

Respondents' attempt to distinguish *Skull Valley* only confirms the conflict. They point out that Utah sought to "systematically block" the plaintiff in that case from storing spent nuclear fuel ("SNF") in Utah, Opp.28, by regulations that "targeted the specific roads leading to the SNF facility," Opp.29. But Virginia has likewise sought to "systematically block" Petitioners from engaging in uranium milling and tailings management operations by targeting the specific activity—uranium mining—that leads directly to milling and tails management. *Skull Valley* cannot be reconciled with the holding below, nor can the Second Circuit's holding that courts will "not blindly accept the articulated purpose of a state statute for preemption purposes" in this context. *Entergy*, 733 F.3d at 416 (brackets omitted).

Finally, as dissenting Judge Traxler also recognized, because "Virginia, not trusting that the federal government has sufficiently protected against the radiological dangers of uranium milling and tailings management, has unilaterally sought to *prevent the involvement of the very private-sector forces that the Act was designed to unleash*," Pet.App.47a-48a, it is also in fatal conflict with the AEA's purposes and objectives.[1]

1. Respondents assert at the outset that no "enacted statutory text" supports preemption. Opp.19 (citation omitted). Not so. The statutory text that

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[1] The Commonwealth's suggestion that we have "abandoned the conflict-preemption argument," Opp.18, is incorrect. Indeed, as the Commonwealth itself admits, that argument plainly "falls within the scope of the question presented." Opp.32.

preempts Virginia's ban is the same statutory text at issue in *PG&E*, *English*, and *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984): States may regulate activities that fall within the NRC's ambit only for "purposes other than protection against radiation hazards." 42 U.S.C. § 2021(k).

Respondents also claim that the purpose and legislative history of Section 2021(k) indicate that it has no preemptive force. Opp.6, 20-21. But as this Court explained in *PG&E*—after surveying the very legislative history upon which Respondents rely—Section 2021(k) codifies "the distinction drawn in 1954 between the spheres of activity left respectively to the federal government and the states." 461 U.S. at 210. Under Respondents' view, this Court's interpretation of Section 2021(k) was flatly wrong from the get-go, and the Court's efforts to define the scope of the preempted field were all pointless, since *there is no such preempted field.*

2. Respondents' central argument—again, that the NRC does not regulate uranium mining, ergo "nothing in the Act prevents States from regulating or banning such mining, *regardless* of the State's alleged purpose," Opp.1—is a non-sequitur. Because Section 2021(k) "[has] defined the pre-empted field, in part, by reference to the motivation behind the state law," *English*, 496 U.S. at 84, one can determine whether a state law is preempted only by examining its purpose without regard to what activity the State purports to be regulating. Respondents thus assume a conclusion that can be reached only at the end of *PG&E*'s purpose inquiry, and then they use it to justify not conducting the required inquiry in the first place.

This upside-down approach is inconsistent with the very nature of an inquiry into purpose or motive. No examination of motive is necessary when a challenged state law *on its face* regulates the radiological hazards of an activity within the purview of the AEA. A pretext analysis comes into play only when a State *claims* to be exercising power legitimately in its hands—whether that be regulating "the generation and sale of electricity," *PG&E*, 461 U.S. at 194, or "law enforcement, fire protection, waste and garbage collection and other similar matters," *Skull Valley*, 376 F.3d at 1247, or, here, the mining of uranium. The literacy tests of the Jim Crow era would still be on the books today if the courts had been compelled to blind themselves to the laws' true purpose. Like the Equal Protection Clause, "the Supremacy Clause cannot be evaded by formalism." *Haywood v. Drown*, 556 U.S. 729, 742 (2009).

Respondents, however, take traditional pretext analysis into new and strange territory, for they defend their pretext *as a pretext*. They admit the preempted purpose of the mining ban and say, "So what?"

3. Nor can Respondents' insistence that States may regulate uranium mining "for *any* reason," Opp.17, reconcile the decision below with the holdings of "each Court of Appeals addressing the issue since *Pacific Gas*." Pet.App.42a (Traxler, J., dissenting). Put simply, if the conclusion that "nothing in the [AEA] regulates" an activity meant "that States can regulate or prohibit [it] for *any* reason," Opp.17, then several of the Utah laws struck down by the Tenth Circuit in *Skull Valley* would still be on the books. Plainly, laws regulating traffic on state roads, the provision of police and fire protection, and garbage removal and sewer

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access are in the heartland of state police powers and are at least as far "outside [the] purview" of the AEA as uranium mining. Opp.1. Utah argued, just like Respondents, that the challenged state laws regulating those activities "are not preempted because they concern areas that characteristically have been governed by the States." *Skull Valley*, 376 F.3d at 1247 (quotation marks omitted). Unlike the panel below, however, the Tenth Circuit recognized that the existence of state authority over these activities

> does not trump the preemption analysis that the controlling Supreme Court decisions require us to undertake. Under that analysis, we consider the purpose and effect of the state law at issue, and, as a result, a state cannot use its authority to regulate law enforcement and other similar matters as a means of regulating radiological hazards.

*Id.* at 1247-48.

Respondents attempt to distinguish *Skull Valley*, but each of the distinctions they offer is illusory. Respondents emphasize that some of the provisions invalidated by the Tenth Circuit "specifically mention[ed] SNF storage." Opp.29. But that point is irrelevant, since Respondents must concede that others "did not mention SNF activities by name," *id.*, and were nonetheless struck down.

Respondents argue that *Skull Valley*'s treatment of those pretextual provisions is distinguishable because Utah "targeted the specific roads leading to the SNF facility and prevented their use," and legislative history revealed that this was designed for the purpose of regulating radiological hazards entrusted to the NRC. *Id.* But Virginia's uranium ban

likewise "target[s]" the only viable uranium deposit in the State and "prevent[s]" it from being mined for the purpose of regulating radiological hazards (arising from milling and tailings management) that are entrusted to the NRC.

Finally, Respondents claim that *Skull Valley* is different because the laws in question there "were part of an integrated package of laws specifically targeting and blocking the SNF facility." Opp.29-30. This too is wrong. Here the challenged uranium ban was enacted as part of a larger package, the balance of which explicitly focused upon concerns about the radiological safety of milling and tailings storage. *See* Pet.28-29; Pet.App.184a-85a (directing study of the "reagents and processing materials to be used" in milling operations, the "quantity and quality of liquid and solid wastes," "the quantity and characteristics of the tailings," and the potential "atmospheric releases and the methods for controlling such releases").

Respondents also fail to resolve the conflict between the panel's decision and the Second Circuit's holding in *Entergy*. There, the challenged Vermont law regulated activity—the generation and sale of electric power—over which the AEA expressly preserved state authority, *see* Pet.31 (citing 42 U.S.C. § 2018), and specifically to evade preemption under *PG&E*, the Vermont Legislature included detailed findings asserting that the law was not motivated by impermissible radiological safety concerns. *Entergy*, 733 F.3d at 415-16. In contrast to the panel below, the Second Circuit refused to end its "inquiry ... at the text of the statute." *Id.* at 416. The invalidity of Virginia's ban follows *a fortiori* from *Entergy*, for here Respondents have *conceded* that its purpose was grounded in impermissible concerns about the

radiological safety of uranium milling and tailings management that are regulated exclusively by the NRC.

4. The field preempted by the AEA is also defined in part "by the state law's actual effect on nuclear safety," *English*, 496 U.S. at 84, and Virginia's uranium ban also directly encroaches upon this portion of the preempted field. The direct, intended effect of the ban on mining uranium ore has been to prevent the subsequent milling of that ore and the storage of the resulting tailings in the Commonwealth. Uranium ore obviously will not be milled, nor will tailings be created and stored, if it is never mined in the first place. As Petitioners' complaint alleges, the "true design and function of Virginia's ban on uranium mining ... is to act as an absolute bar on the construction of a tailings management facility in the Commonwealth." Pet.App.232a.

Respondents nevertheless argue that the ban on mining has no "direct and substantial effect" on activities regulated by the NRC, because it merely "reduces the demand for uranium milling and tailings management by reducing the supply of native ore for processing." Opp.26. That is akin to arguing that a ban on the production of silicon chips would have only an "indirect" effect on computer sales, since it would merely reduce the demand for computers by "reducing the supply" of one necessary material. Because Petitioners' deposit is the only economically viable source of uranium within hundreds of miles of the Commonwealth, the effect of the ban on mining is not simply to "reduce[ ] the demand for uranium milling and tailings management" in Virginia, *id.*, but rather to completely eliminate it. The Commonwealth well understood this to be true; again, Respondents have

conceded uranium mining was banned for the purpose of preventing milling and tailings management.

Respondents' disingenuous argument on this point only serves to further underscore the split of circuit authority created by the decision below. In *Skull Valley*, the Tenth Circuit held that the "Road Provisions" were preempted not only because of their impermissible purpose but also because "by jeopardizing access to the proposed SNF storage facility, the Road Provisions directly and substantially affect decisions regarding radiological safety levels by those operating nuclear facilities." 376 F.3d at 1253. Like Respondents here, Utah contended that this effect was too indirect, since the facility would "not need road access at all" if the storage company chose "to construct a rail line" leading to it. *Id.* The Tenth Circuit rejected that argument, noting that this "contingenc[y]" did nothing to ease the "substantial obstacle [the provisions pose] to the construction of an SNF storage facility now." *Id.* The effect of the mining ban on preempted activities can be dismissed as "indirect" only by repudiating *Skull Valley's* conclusion on this point as well.[2]

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[2] Contrary to Respondents' argument, *see* Opp.25-27, the state tort laws at issue in *Silkwood* and *English* are not remotely analogous to the uranium ban. Those tort remedies might have tangentially affected a nuclear facility's decision-making related to radiological safety by "attach[ing] additional consequences" to the conduct giving rise to the tort claims, but the same could be said of "every state law that in some remote way may affect the nuclear safety decisions," such as "state minimum wage and child labor laws." *English*, 496 U.S. at 85. In contrast, the ban on uranium mining has its intended effect on its intended target—it completely eliminates milling and tails management operations.

5. The panel's decision has dangerous implications for our economy, national security, and the fate of preemption doctrine. The Commonwealth labors to minimize some of these threats, but its arguments are not reassuring.

Most critically, Respondents say *nothing* to address the decision's consequences for preemption jurisprudence under the AEA and more generally. The AEA carefully delineates the boundaries between state and federal authority over nuclear matters, *see* Brief of Senators Cotton, Inhofe, and Cruz as *Amici Curiae* in Support of Petitioners 5-10 (May 25, 2017) ("Senators' Amicus"), and *PG&E*'s preemption analysis has for thirty years safeguarded this balance. The majority's blinkered approach, by allowing States to nullify the AEA so long as they act pretextually, threatens to upend this equilibrium. *See* Brief for *Amicus Curiae* the Chamber of Commerce of the United States of America in Support of Petitioners 8-11 (May 25, 2017) ("Chamber's Amicus"). And because this elevation of form over substance is at war with this Court's preemption doctrine more generally, the threat posed by the panel's decision extends far beyond the boundaries of the AEA. *See id.* at 11-14.

Moreover, the immediate consequences of the decision below alone justify this Court's review. While nuclear energy supplies 20 percent of our energy needs, little more than five percent of the uranium needed to fuel our reactors is produced domestically. More troubling, 38 percent of uranium imports come from Russia and Russia-allied states. (Respondents cryptically say we "exaggerate" this amount, but the percentage they come up with is the same. *Compare* Opp.36-37, *with* Pet.7.)

That dependency not only undercuts our domestic interests, *see* Chamber's Amicus 5-8; it also damages our national security by giving Russia geopolitical leverage, *see* Senators' Amicus 17-18. Moreover, it impedes our ability to replenish the stockpiles of uranium used in our naval vessels and nuclear arsenal. *See id.* at 15-17. As the United States explained in its petition in *United States v. Eurodif, S.A.*, ensuring a healthy domestic uranium industry is "a matter of compelling importance to U.S. national security interests." Pet.App.347a.[3] Permitting Petitioners to mine their massive uranium deposit would do much to solve our dependency on foreign imports.

Respondents' attempt to diminish these risks falls flat. Respondents claim that the uranium "market is glutted" by transfers out of the Department of Energy's ("DOE") stockpile. Opp.35. But pointing to DOE reserves cannot solve the problem created by the decision below. Most fundamentally, DOE is legally prohibited from artificially flooding the market with uranium from its stockpile precisely because it is in the national interest to protect a sustainable domestic production capacity. *See* 42 U.S.C. §§ 2296b-3(a), 2297h-10(d)(2)(B).

Moreover, the factual predicate for Respondents' argument is false. Respondents cite a 2013 DOE

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[3] As Respondents note, *Eurodif* involved foreign dumping of enriched uranium, Pet.7, which threatened a different phase of the uranium fuel cycle—the domestic enrichment of uranium that has already been mined, Pet.App.328a-29a. But the concerns raised by the Solicitor General in that case apply equally here. After all, the domestic production of unenriched uranium is an essential predicate step to enriching it.

report for the proposition that the Government's inventories could last "at least 20 years," Opp.35, but DOE's subsequent 2017 determination concludes that under the current rate of transfer, its stockpile will actually be "exhausted in 2021," 82 Fed. Reg. 21,594, 21,597 (2017), long before supply from Petitioners' deposit would come on line.

## CONCLUSION

The Court should grant the writ.

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Respectfully submitted,

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